Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of GTE Telephone Operators GTE Tariff No. 1 GTOC Transmittal No. 1148	CC Docket No. 98-79

Comments on Direct Case of Covad Communications Company

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SUMMARY

In these comments, Covad Communications demonstrates that the Commission can and should require GTE, and other dominant local exchange carriers, to tariff DSL in the Federal jurisdiction.

The Commission previously has recognized that traffic between a subscriber and the subscriber's information service provider ("ISP") is jurisdictionally mixed, and cannot feasibly be separated into interstate and intrastate components. Consequently, under well-established jurisdictional principles, the Commission can assert exclusive Federal jurisdiction over services, such as DSL, that are used to transport data between a subscriber and the subscriber's ISP.

Historically, of course, the Commission has chosen not to require Federal tariffing of *conventional* telecommunications services – such as analog dial-up connections – used to transport communications between subscribers and their ISPs. The Commission's decision to allow the States to tariff such services, however does not demonstrate that they are jurisdictionally intrastate. Rather, it reflects a policy decision to forgo the exercise of the full measure of the agency's legal authority. In the *Access Charge Appeal*, the Eighth Circuit upheld this approach. The Commission, however, should not extend this policy of "jurisdictional forbearance" to *advanced* telecommunications service used to provide this transport link. Rather, it should require that dominant carriers tariff such services in the Federal jurisdiction.

Imposition of a uniform, cost-based, pro-competitive Federal regulatory regime for DSL would plainly advance the goals of Section 706 of the Telecommunications Act, which seeks to promote the deployment of advanced telecommunications services. State regulation, in

contrast, could impede the nation-wide deployment of DSL service. The States have little experience in regulating advanced telecommunications services. The States' attempts to do so, moreover, have created reason for concern.

Federal tariffing of DSL services will not disturb well-established Commission policies applicable to ISPs. If the Commission chooses to allow ISPs to purchase DSL services out of Federal tariffs, there is no reason why the FCC cannot allow ISPs to continue to purchase conventional telecommunications services out of State tariffs. This is entirely consistent with the Commission's long-standing practice of allowing ISPs to choose between federal access service (including ONA Basic Serving Arrangements) and State-tariffed business services.

Similarly, requiring Federal tariffing of DSL service would not prevent the Commission from requiring incumbent LECs to pay reciprocal compensation to Competitive Local Exchange Carriers ("CLECs") that terminate conventional telecommunications traffic at an ISPs' premises. The States must implement reciprocal compensation in a non-discriminatory manner. Thus, if a State requires an ILEC to pay reciprocal compensation to a CLEC that delivers physically local conventional telecommunication traffic to other business users that interconnect to a mixed use private line network, then the State also must require the ILEC to pay reciprocal compensation to a CLEC that delivers physically local traffic to an ISP.

If the Commission declines to assert Federal regulatory authority over such offerings, it should establish rules to prevent the States from regulating advanced telecommunications services in a manner that would impede achievement of the goals set by Congress in Section 706 of the Telecommunications Act. In particular, the Commission should "preemptively preempt" the States in three specific respects. First, the Commission should

preempt the States from tariffing advanced services provided by non-dominant carriers. Second, the Commission should preempt the States from enforcing tariffs that set prices at non-cost-based levels. And, finally, the Commission should preempt the States from enforcing tariffs that bundle information services with advanced telecommunications.

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Comments on Direct Case of Covad Communications Company

Covad Communications Company submits the following comments in response to the issues raised in the Commission's *Order Designating Issues For Investigation.*[1] In the *Order*, the Commission seeks comment as to whether GTE's proposed Digital Subscriber Line ("DSL") service is jurisdictionally interstate.[2] The Commission also has inquired whether the carrier's offering should be tariffed at the Federal level or whether the agency should "defer" to the States to tariff DSL services.[3] Although the Commission has specifically requested comment on the

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[1] *See GTE Telephone Operators, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Order Designating Issues for Investigation, DA 98-1667, CC Docket No. 98-79 (rel. Aug. 20, 1998) ("*Order*").

[2] *See id.* ¶ 12.

[3] *Id.*

tariff filed by GTE, this investigation raises fundamental issues relevant to the regulation of all advanced telecommunications services.[4]

DSL-based services typically provide the first link in a jurisdictionally mixed transmission that cannot be separated into interstate and intrastate components. Historically, the Commission has chosen not to impose Federal tariff regulation on conventional telecommunications services that provide this link, which transports traffic between subscribers and their information service providers ("ISPs"). However, the agency should not extend this policy of "jurisdictional forbearance" to advanced telecommunications services. Instead, the Commission should require GTE and other dominant local exchange carriers that provide DSL services to tariff their offerings in the Federal jurisdiction.

STATEMENT OF INTEREST

Covad is a Competitive Local Exchange Carrier ("CLEC") that provides high-speed, digital telecommunications services. Founded eight months after enactment of the Telecommunications Act of 1996, the company operates all-digital, packet networks that pass several million homes and businesses in cities across the country. Covad's advanced telecommunications network is used by small businesses and residential users who seek affordable high-speed access to the Internet and other information services. Employees who telecommute from home also use Covad's services to connect to their company's computer networks.

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[4] Consistent with the Commission's *Designation Order*, Covad's comments only address whether the Commission can and should assert jurisdiction over DSL service. If the Commission decides to do so, it will need to give further consideration to the specific terms and conditions contained in GTE's tariff

The vast majority of the traffic carried over Covad's facilities ultimately crosses State and even international borders. If the Commission determines that xDSL services are intrastate, however, Covad's nationwide operations would be affected by a patchwork of State regulations. These requirements are likely to vary widely from jurisdiction to jurisdiction and, in some cases, may raise barriers to the deployment of DSL and other advanced telecommunications services. Indeed, the hodge-podge of DSL loop availability, terms, prices, and collocation practices already has had an adverse effect on the pace of DSL deployment. In light of this experience, Covad has consistently advocated the adoption of uniform national rules to facilitate competitive entry into the local markets for advanced telecommunications services.[5]

I. THE COMMISSION HAS JURISDICTION TO REGULATE DSL SERVICES

Three well-settled principles are fundamental to the correct resolution of the issues raised in this proceeding. First, the jurisdictional nature of a transmission must be determined on an end-to-end basis.[6] Second, the Commission's interstate jurisdiction extends to the physically local telecommunications services that are used in connection with interstate transmissions "to the extent of their interstate use."[7] And, finally, where it is not feasible to

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[5] Just recently, for example, the Company filed an *amicus* brief with the United States Supreme Court demonstrating that, contrary to the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, the FCC has the statutory authority to establish a uniform national pricing methodology for unbundled network elements ("UNEs"). *See* Brief of Amicus Curiae Covad Communications Company in Support of Petitioners Federal Communications Commission and the United States of America, *AT&T Corp. v. Iowa Utilities Board* (U.S. Apr. 2, 1998) (Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141).

[6] *See* 47 U.S.C. § 153(51) (defining a "wire communications" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds . . . between the points of origin and reception.").

[7] *See National Association of Regulatory Utility Commissioners v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984); *see New York Tel. Co. v.* FCC, 631 F.2d 1059, 1066 (2d Cir. 1980) ("The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology."); *Petition for Emergency and Declaratory*

separate the interstate and intrastate component of a physically local telecommunications service, and to apply differing Federal and State regulations to each component, the Commission may preempt all State regulation of the service.[8]

As the Commission has recognized, traffic between a subscriber and the subscriber's information service provider is jurisdictionally mixed and inseverable.[9] In a typical configuration, a subscriber sends a request for information from his or her premises, over local telecommunications facilities, to the subscriber's ISP. The ISP, in turn, routes the subscriber's request, over the Internet, to computer servers that contain the requested information. These servers may be located in the same State as the subscriber, a different State, or even another country. Neither the subscriber, nor the ISP, nor the serving LEC typically has any way of knowing the location of the computer servers accessed by the subscriber during the course of a given on-line session.[10] Traffic between subscribers and other multi-state wide area networks ("WANs") has similar properties.

Relief Filed by Bell South, 7 FCC Rcd 1619, 1621 (1992), *aff'd sub nom. Georgia PSC v. FCC*, No. 92-8257 ("*MemoryCall Order*") ("The Commission has jurisdiction over the local network when it is used in conjunction with the origination and termination of interstate calls."); *see generally* J. Nadler, Give Peace a Chance: FCC-State Relations After *California III*, 47 Fed Comm. L. J 457, 488-501 (1995) (collecting cases regarding the extent of the Commission's interstate jurisdiction).

[8] This is often referred to as "inseverability." *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986); *California PSC v. FCC*, 39 F.3d 919, 931 (9th Cir. 1994); *California PSC v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 114 (D.C Cir. 1989); *Texas PUC v. FCC*, 886 F.2d 1325, 1333 (D.C. Cir. 1989); *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989); *Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982); *North Carolina Utility Comm'n v. FCC*, 537 F.2d 787, 793 (4th Cir. 1976).

[9] *See* Brief of Federal Communications Commission, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618, 8th Cir. 1997, at 79 ("*FCC Brief*").

[10] *See* Kevin Werbach, Office of Plans and Policy, Federal Communications Commission, "*Digital Tornado: The Internet and Telecommunications Policy*," at 45 (Mar. 1997) ("*OPP Working Paper*") ("For an Internet connection, . . . the user may have no idea where the sites he is viewing are located. One Internet 'call' may connect the user to information both across the street and on the other side of the world. Furthermore, dynamic routing means that

Consistent with the principles set forth above, the Commission plainly has authority to regulate a DSL service that carries telecommunications transmissions between a subscriber and the subscriber's ISP (or other multi-state WANs) to the extent that it provides a portion of the transmission path between a subscriber and an out-of-state computer server.[11] Indeed, the Commission has recognized that, because of the jurisdictionally inseverable nature of this traffic, it could assert *exclusive* Federal jurisdiction over services, such as DSL, that are used to transport data between a subscriber and the subscriber's ISP.[12]

Historically, of course, the Commission has chosen not to require Federal tariffing of conventional telecommunications services – such as analog dial-up connections – used to transport communications between subscribers and their ISPs (or any other multi-state computer network). The Commission's decision to allow the States to tariff such services, however, does not demonstrate that they are jurisdictionally intrastate. The Commission has declined to require Federal tariffing of jurisdictionally interstate services in numerous circumstances. For example, the Commission does not regulate Centrex services, even though they are used in connection with interstate telecommunications.[13] Similarly, the Commission does not require Federal

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packets may take different routes across the Internet to reach the same site, so even the location of the site the user is contacting does not provide sufficient information to identify the routing of the call for jurisdictional purposes.").

[11] *Cf. California PUC v. FCC*, 4 F.3d 1505 (9th Cir. 1993) (FCC may require LECs to file interstate tariffs for Open Network Architecture Basic Service Elements, which are physically local network services used by information service providers).

[12] *See FCC Brief* at 80 (The FCC "could have even preempted state regulation on the grounds that the ISP's 'mixed use' networks were jurisdictionally inseverable.").

[13] *See Illinois Bell*, 883 F.2d at 114 (The fact that costs are assigned to the intrastate jurisdiction "does not negate the mixed interstate-intrastate character of services like Centrex." The Commission, therefore, may exercise exclusive Federal jurisdiction).

tariffing of "vertical services," such as call forwarding and call waiting, which also are used in connection with interstate communications.[14]

The Commission's treatment of conventional telecommunications services used to connect subscribers to their ISPs reflects a policy decision to forgo the exercise of the full measure of the agency's legal authority. In lieu of Federal tariffing, the Commission has chosen to require incumbent LECs to recover the cost of transporting jurisdictionally mixed traffic between a subscriber and the subscriber's ISP through a combination of Federal charges (such as the Subscriber Line Charge) and State tariffed rates.[15]

In the *Access Charge Appeal*, the Eighth Circuit upheld this approach. The court observed that:

> As the FCC argues, the services provided by ISPs may involve both an intrastate and an interstate component and it may be impractical if not impossible to separate the two elements. *See California v. FCC*, 905 F.2d 1217, 1244 (9th Cir. 1990). Consequently, the FCC has determined that the facilities used by ISPs are "jurisdictionally mixed," carrying both interstate and intrastate traffic. FCC Brief at 79. Because the FCC cannot reliably separate the two components involved in completing a particular call, or even determine what percentage of overall ISP traffic is interstate or intrastate, *see id.*, . . . the Commission has appropriately exercised its *discretion* to require an ISP to pay intrastate charges for its line and to pay the [Federal Subscriber Line Charge] . . .[16]

As a result of the Eighth Circuit's decision, the regulatory treatment of *conventional* telecommunications traffic between a subscriber and the subscriber's ISP is now

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[14] *Filing and Review of Open Network Architecture Plans*, Phase I, 4 FCC Rcd 1, 144 & n.156 (1988) (The Commission "could require dual federal/state tariffing or possibly even exclusive federal tariffing . . . for [vertical] service . . . [but] we see no need to require separate federally tariffed charges for such service.").

[15] *See FCC Brief* at 79-80.

[16] *Southwestern Bell Tel. Company v. FCC*, No. 97-2618, at 4 (8th Cir. Aug. 19, 1998) (emphasis added).

settled. However, the present proceeding concerns GTE's DSL service, which is an *advanced* telecommunications service. Under existing jurisdictional principles, the FCC could assert exclusive jurisdiction over this new, jurisdictionally mixed, inseverable service — or the agency could extend its policy of deferring to the States to tariff these new offerings.

Covad believes that, in the present case, the Commission should not defer to the States. Rather, it should exercise the full measure of its statutory authority.[17] As the company explains below, the Commission's decision to exercise this authority for xDSL services will not require the agency to alter currently existing policies relating to conventional telecommunications traffic.

II. THE COMMISSION SHOULD ASSERT JURISDICTION OVER DSL SERVICES, RATHER THAN DEFERRING TO THE STATES

The GTE tariff under investigation seeks to introduce an advanced telecommunications capability known as Digital Subscriber Line or DSL. This breakthrough technology enables carriers to use existing copper loops as broadband digital conduits.[18] DSL

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[17] There is no constitutional impediment to exclusive Federal regulation of DSL services. Under the Mann-Elkins Act, 36 Stat. 359 (1910), which was in effect between 1910 and 1934, the Interstate Commerce Commission ("ICC") was given authority to regulate interstate telecommunications. The ICC's regulatory authority, which included the right to review tariffs and order interconnection, was based on the agency's existing authority to regulate the railroad industry. In the *Shreveport Rate Case*, the Supreme Court upheld the power of Congress – under the Interstate Commerce Clause — to authorize the agency to regulate rates for the transportation by rail of goods wholly within a single State on the grounds that such rates could "affect" interstate commerce. *See Houston, E. & W. Tex. Ry v. United States*, 234 U.S. 342, 353 (1914) ("Congress possesses . . . the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled."). In a similar manner, the ICC had authority to regulate rates for physically intrastate communications services on the grounds that such rates could "affect" interstate commerce in communications. While Section 2(b)(1) of the Communications Act limits the FCC's statutory authority over purely intrastate telecommunications, the agency retains the constitutional and statutory authority to preempt State regulation intrastate services, when – as here – such regulation cannot feasibly be separated from the agency's regulation of interstate commerce

[18] DSL technologies require the deployment of equipment at each end of the local loop. One "modem" must be installed on the subscriber's premises and a second paired "modem" must be placed in the LEC's network. This

services, such as GTE's offering, have the potential to make affordable, high-speed access to the Internet and other information services a reality for consumers, small businesses, schools, libraries, and healthcare institutions.

DSL service differs fundamentally from conventional telecommunications services, such as analog business line service, that are typically used to provide connectivity between a subscriber and the subscriber's ISP. Conventional circuit-switched telecommunications services – which are designed to carry voice traffic – temporarily create a *dedicated physical path* from the user's premises, through the LEC's central office switch, to the ISP's premises. This connection lasts for the duration of an individual call. Although well suited to voice conversations, such dedicated physical connections wastefully occupy network resources when used for packetized digital traffic, which has "bursty" transmission characteristics.

DSL services, in contrast, create a permanent *virtual connection* between a subscriber and his or her ISP. With DSL service, subscriber traffic is carried from the subscriber's premises to the LEC's serving end-office over the local loop. At the serving end-office the subscriber's telecommunications traffic is routed onto a packet network for high-speed delivery to the subscriber's ISP.[19] Consequently, the data traffic completely bypasses many of the network resources — for example, local switches used for voice traffic.[20] As the

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equipment can then be used to derive multiple transmission channels from a subscriber's existing copper-based local loop. In some DSL configurations, it is possible for a subscriber to make voice calls at the same time that he or she uses the local loop for data communications. In other configurations, a DSL line may only be used for providing broadband digital data communications services.

[19] *See GTE Transmittal No. 1148, Description & Justification* at 2.

[20] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, CC Docket No. 98-147, at ¶ 30 (rel. Aug. 7, 1998) ("*Advanced Telecommunications Notice of Proposed Rulemaking*"). This use of separate facilities will significantly reduce the difficulty of allocating costs between the Federal and State jurisdictions.

Commission has recognized, the use of DSL and packet networks is more efficient than conventional circuit-switched services for transmitting data and other types of information.[21]

Section 706 of the Communications Act directs the FCC to take actions to promote the deployment of "advanced telecommunications services," such as DSL service.[22] Imposition of a uniform, cost-based, pro-competitive Federal regulatory regime for DSL would plainly advance this important statutory objective. Indeed, the FCC already has taken a significant step in this direction through the adoption of its recent Notice of Proposed Rulemaking in the *Advanced Telecommunications* docket, which proposes a Federal regulatory regime intended to encourage ILEC deployment of DSL services.[23] Requiring Federal tariffing of DSL services, such as those to be provided by GTE, is the next logical step.[24]

State regulation, in contrast, could impede the nation-wide deployment of DSL service. The States have little experience in regulating advanced telecommunications services. The States' attempts to do so, moreover, have created reason for concern. For many years, States have permitted the ILECs to "strategically price" ISDN services in a manner that has deterred widespread deployment.[25] More recently, some States have set prices for local loops that are

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[21] *See id.* at ¶¶ 28-30.

[22] *See id.* at ¶ 35.

[23] *See id.* at ¶¶ 85-117.

[24] *See id.* at ¶ 116 ("[T]o the extent that an advanced services affiliate provides interstate access services, the Commission has clear authority to regulate the separate affiliate's provision of those services.").

[25] *See Economics and Technology, Inc. The Effect of Internet Use on the Nation's Telephone Network*, at 14 (Jan. 22, 1997); *OPP Working Paper* at 76, 77 ("[D]espite growing interest in ISDN as an Internet access technology, only a relatively small number of customers have ISDN lines in service. According to one study, approximately 1.4% of modem users connected to the Internet using ISDN in early 1996.").

provided as Unbundled Network Elements in a manner that has discouraged deployment of DSL services. Many States, for example, allow ILECs to impose a "premium" – in some cases up to 200 percent – for loops that are certified to carry digital traffic.[26] In other cases, States have stood by while ILECs have failed to provide "DSL-capable" unbundled loops, despite clear language in multiple FCC orders that require ILECs to do so.[27]

If allowed to regulate DSL service, the States also may permit incumbent carriers to price their DSL service at a level that does not reflect an appropriate share of the cost of the local loop – even though 99% of the copper loop's capacity is used for DSL data while only 1% is used for analog POTS.[28] Permitting these practices would, in turn, allow ILECs to put competing DSL providers such as Covad, which must lease the use of local loops from the ILECs as UNEs, at a considerable competitive disadvantage.[29] Uniform Federal regulation of

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[26] For example, in Texas the monthly charge for an analog-certified loop is $12.14 in urban areas, $13.65 in suburban areas, and $18.98 in rural areas. By contrast, the monthly charge for loops certified to carry digital traffic is $34.91 in urban areas, $37.54 in suburban areas, and $46.09 in rural areas. *See Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops*, Docket Nos.16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, 17781, Arbitration Award (Tex. Public Utility Comm'n Dec. 17, 1997).

[27] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, 15690-91 (1996) (subsequent history omitted).

[28] Conventional analog service uses only 0-8 KHz frequencies on a copper loop. ADSL technology allows a carrier to provide high speed digital telecommunications services by using the 25 KHz to approximately 1.3 MHz frequencies on the same copper loop. *See*, Massimo Sorbara, Globespan Semiconductor, Inc., *Spectral Compatibility of DSL Systems*, Version 1.0 - June 16, 1998 at 12. Thus, the high speed digital service uses more than 1000 KHz and the conventional analog service uses less than 10 KHz, a ratio of 99 to one.

[29] In this case, the strategy would involve an ILEC setting a high rate for the loop UNEs leased to providers such as Covad, and a low price for DSL services offered to end-users in competition with providers such as Covad. This pricing combination would force carriers like Covad that purchase essential elements (*i.e*, loop UNEs and physical collocation) from an ILEC either to lose money matching the ILEC's low price for DSL services or to lose customers to the ILEC.

DSL rates is the most effective way to deter ILECs from subjecting competing DSL providers to such an anti-competitive strategy.

III. FEDERAL TARIFFING OF DSL SERVICE WOULD NOT REQUIRE THE COMMISSION TO ALTER WELL-ESTABLISHED POLICIES REGARDING *CONVENTIONAL* TELECOMMUNICATIONS SERVICES

The Eighth Circuit's recent decision in *Southwestern Bell* makes clear that, while the FCC *may* exercise authority over jurisdictionally mixed services, it is not *obligated* to do so.[30] Consequently, even if the Commission chooses to allow ISPs to purchase DSL services out of Federal tariffs, there is no reason why the agency cannot allow ISPs to continue to purchase conventional telecommunications services out of State tariffs. As demonstrated above, conventional circuit switched services differ fundamentally from DSL-based services. Moreover, permitting ISPs to purchase conventional telecommunications services pursuant to State tariffs is entirely consistent with the Commission's long-standing practice of allowing ISPs to choose between federally and State regulated services. For example, the Commission's Open Network Architecture rules give ISPs a choice: they can use State-tariffed business lines *or* they can purchase federally tariffed Basic Service Arrangements ("BSAs").[31] No one has ever suggested that the availability of federally tariffed BSAs "threatens" the regulatory regime applicable to ISPs.

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[30] As recognized by the FCC, traffic between a subscriber and the subscriber's ISP is jurisdictionally mixed. *See FCC Brief* at 79.

[31] *See ONA Phase I Order*, 4 FCC Rcd at 167-68 ("[U]nder the tariffing structure we approve today, [ISPs] will have an increased choice among new ONA services and other existing basic services, subject to the pricing policies of the States and this Commission.")

Requiring Federal tariffing of advanced telecommunications services, such as DSL service, also would not prevent the Commission from requiring incumbent LECs to pay reciprocal compensation to Competitive Local Exchange Carriers ("CLECs") that terminate conventional telecommunications traffic at an ISPs' premises. To the extent that the Commission continues to allow the States to regulate physically local traffic between a subscriber and the subscriber's ISP, the States must do so in a non-discriminatory manner.[32]

The Commission has recognized that an ISP is simply another business customer that interconnects local exchange facilities to a jurisdictionally mixed private line network.[33] Thus, if a State requires an ILEC to pay reciprocal compensation to a CLEC that delivers physically local conventional telecommunication traffic to other business users that interconnect a mixed-use private line network, then the State also must require the ILEC to pay reciprocal compensation to a CLEC that delivers physically local traffic to an ISP. The Commission's decision to adopt a Federal regulatory regime for advanced telecommunications service traffic does not alter the State's obligations regarding the regulation of conventional traffic.

IV. IF THE COMMISSION ALLOWS THE STATES TO REGULATE DSL SERVICE, IT SHOULD PREEMPT STATE REGULATIONS THAT WOULD IMPEDE THE DEPLOYMENT OF DSL AND OTHER ADVANCED SERVICES

Although this investigation addresses GTE's proposed DSL offering, the decisions made in this proceeding will have a profound effect on the regulation and deployment

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[32] *See also New York Telephone v. FCC*, 631 F.2d 1059 (2d Cir. 1980) (The FCC has authority to ensure that the States regulate physically local facilities used in connection with interstate communications in a non-discriminatory manner.)

[33] *See MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-12 (1983).

of *all* advanced telecommunications services. For the reasons demonstrated above, Covad believes that the Commission should require the Federal tariffing of advanced telecommunications services, such as GTE's proposed offering. If the Commission declines to assert Federal regulatory authority over such offerings, however, Covad requests that the Commission adopt a Further Notice of Proposed Rulemaking in the *Advanced Telecommunications* proceeding[34] in order to establish rules to prevent the States from regulating advanced telecommunications services in a manner that would impede achievement of the goals set by Congress in Section 706. In particular, Covad urges the Commission to "preemptively preempt" the States in three specific respects.[35]

No tariffing of advanced services provided by non-dominant carriers. The Commission has recognized that requiring non-dominant local exchange carriers to tariff their services is not in the public interest. The agency therefore eliminated the requirement that these carriers tariff their interstate access services.[36] As the Commission explained, detariffing facilitates "market entry of new non-ILEC providers of interstate exchange access services by not requiring that they disclose their prices to competitors"[37] and by eliminating "the time and

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[34] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, CC Docket No. 98-147 (rel. Aug. 7, 1998).

[35] As explained above, because advanced services are jurisdictionally mixed and inseverable, the Commission could assert exclusive jurisdiction. Even if the Commission delegates some regulatory authority to the States, the agency would be well within its authority to impose limits on the State's exercise of that authority.

[36] *See Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, 12 FCC Rcd 8596 (1997); *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, 20760 (1996) ("*Interexchange Forbearance Order*") (detariffing interstate services provided by interexchange carriers).

[37] *Hyperion Telecommunications*, 12 FCC Rcd at 8610. In addition, the Commission explained that "marketplace forces will preclude non-ILECs from charging unreasonable rate for interstate exchange access" because "they will

expense of preparing and filing tariffs."[38] Preempting State tariff filing requirements for advanced services would similarly promote competitive entry and facilitate the introduction of new offerings. The Commission therefore should preempt the States from requiring non-dominant LECs to file tariffs for advanced services

No below-cost tariffed rates for dominant-carrier-provided advanced telecommunications services. The Commission also should preempt the States from allowing dominant ILECs to file tariffs that set below-cost prices for DSL service. The decision of the D.C. Circuit in *NARUC III*[39] provides ample precedent for such preemption. In that case, the court considered the extent of the FCC's authority to regulate inside wiring – which, like DSL, may be used for both interstate and intrastate transmissions. Although the court found that some disparate Federal and State regulation of inside wiring could co-exist, it concluded that the Commission may "proscribe state tariffs that would result in the subsidization of the installation and maintenance of [carrier-provided] inside wiring" because this would impede the agency's policy of creating a competitive market for inside wiring.[40]

In the present matter, State tariffs that provide for below-cost pricing of DSL services by dominant carriers would impede the congressional goal of fostering the competitive

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be competing with ILECs whose rates are subject to regulation, and will, to some extent, constrain non-ILEC prices." *Id.* at 8609-10.

[38] *Id.* In the *Interexchange Forbearance Order*, the Commission explained that "requiring non-dominant interexchange carriers to file tariffs . . . impedes vigorous competition in the market for such services by: (1) removing incentives for competitive price discounting; (2) reducing or taking away carriers' ability to make rapid, efficient responses to changes in demand or cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs." *Interexchange Forbearance Order*, 11 FCC Rcd at 20761

[39] 880 F.2d 422 (D.C. Cir. 1989) ("*NARUC III*").

[40] *Id.* at 430.

deployment of advanced telecommunications services.[41] The Commission, therefore, has authority to proscribe such tariffs. In particular, the agency should preempt the States from allowing dominant carriers to charge any rate for DSL service that fails to recover an appropriate portion of the carrier's underlying loop costs. This is especially important in situations in which the carrier uses the same loop to provide both analog voice service and DSL service.

No bundling of advanced services and information services. Finally, the Commission should preempt the States from enforcing tariffs that allow carriers to bundle DSL service with other services. For example, a dominant carrier should not be permitted to bundle DSL service with packet transport service between the central office and an ISP's premises. Nor should the carrier be permitted to bundle DSL with carrier-provided Internet access services. Here, again, *NARUC III* provides ample precedent. In that case, the court held that the Commission could bar States from allowing carriers to bundle telecommunications services with inside wiring, because bundling would prevent achievement of the agency's goal of giving consumers "the benefit of a free market and free choice in the installation and maintenance of inside wiring."[42] In the present case, preventing the States from permitting carriers to bundle

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[41] *See* 47 U.S.C. § 157. In particular, Covad is concerned that ILECs will continue to attempt to put "zero cost" loops in their DSL tariffs. This would result in conventional analog service underwriting the most significant recurring monthly cost for DSL service. This is a particular concern in situations in which the ILEC receives a federal or state subsidy to provide conventional telecommunications service to a residential consumer. In such cases, the carrier would effectively be using the universal service subsidy to underwrite its provision of DSL services.

[42] *Id.*

DSL services would facilitate competition in the information services market, thereby facilitating congressional policy.[43]

CONCLUSION

For the foregoing reasons, the Commission should conclude that GTE's proposed DSL offering is a jurisdictionally mixed, inseverable service. The Commission should therefore require GTE (and other providers offering similar advanced telecommunications services) to tariff DSL service in the Federal jurisdiction. At the same time, the Commission should not disturb its existing policies governing conventional telecommunications services, which allow ISPs to purchase State-tariffed business lines and require ILECs to pay reciprocal compensation to CLECs that deliver conventional telecommunications traffic to ISPs. If the Commission decides to defer to the States and allow them to tariff DSL services, however, the agency should issue a Further Notice of Proposed Rulemaking in the Section 706 proceeding. In the Notice, the

[43] *See* 47 U.S.C. § 230(b)(1) ("It is the policy of the United States . . . to promote the continued development of the

Commission should propose to preempt various forms of State tariff regulation that would impede the widespread, affordable deployment of advanced telecommunications services.

Respectfully submitted.

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nternet and other interactive computer services . . . .").

CERTIFICATE OF SERVICE

I, Barbara E. Fitzpatrick, hereby certify that copies of the foregoing *Comments on Direct Case of Covad Communications Company* were served this 18th day of September, 1998 on the following:

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